Supreme Court, U.S.
FILED
MAY 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1765

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BANKERS LIFE AND CASUALTY CO.
Appellant,

v.

LLOYD M. CRENSHAW
Appellee.

On Appeal from the Supreme Court of Mississippi

MOTION TO DISMISS

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50 pp

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No. 85-1765

BANKERS LIFE AND CASUALTY CO.

Appellant,

v.

LLOYD M. CRENSHAW

Appellee.

On Appeal from the Supreme Court of Mississippi

MOTION TO DISMISS

Pursuant to 28 U.S.C. § 1257(2) (1986) and Rule 16.1(b) of the Rules of the Supreme Court of the United States, the Appellee, Lloyd M. Crenshaw, hereby moves to dismiss this appeal on the grounds that the federal questions sought to be reviewed were neither timely nor properly raised before the Circuit Court of Jackson, Mississippi, or the Supreme Court of Mississippi. In addition, the questions presented are not substantial federal questions appropriate for review by this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 28 U.S.C. § 1257 (1986) provides in pertinent part:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: . . .
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

2. Rule 16.1(b) of the Rules of the Supreme Court of the United States provides that:

> The Court will receive a motion to dismiss an appeal from a state court on the ground that it does not present a substantial federal question; or that the federal question sought to be reviewed was not timely or properly raised and was not expressly passed on; or that the judgment rests on an adequate non-federal basis.

3. Rule 6 of the Rules of the Mississippi Supreme Court provides in part that:

> (a) The appellant shall file an assignment of error on or before the due date of appellant's brief. . . . The assignment of errors shall set out separately and particularly each error asserted and intended to be urged. . . .

> (b) No error not distinctly assigned shall be argued by counsel, except upon request of the Court, but the Court may, at its option, notice a plain error not assigned or distinctly specified.

4. *Miss. Code Ann.* § 11-7-59(4) (1972) stated in pertinent part:

> If the defendant desire to prove, by way of defense in an action, any affirmative matter in avoidance, which by law may have been proved heretofore under special plea he shall set forth in his answer to the action such affirmative matter and incorporate such defense therein, otherwise such matter shall not be allowed to be proved at trial.

5. *Miss. Code Ann.* § 83-17-1 (1972) provides in pertinent part:

> [An insurance agent] knowingly procuring, by fraudulent representations, payment or the obligation for the payment of a premium of insurance shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or be imprisoned for not more than one year.

STATEMENT OF THE CASE

The Appellee, Lloyd M. Crenshaw ("Crenshaw"), generally agrees with the statement of the case provided in the Jurisdictional Statement of the Appellant, Bankers Life and Casualty Company ("Bankers Life"). The Appellee, however, would like to correct certain misstatements and omissions therein.

Bankers Life claims that it rejected Crenshaw's claim on the basis that "the limb loss was due to severe arteriosclerosis and was therefore not an 'accidental' loss covered by the policy." Jurisdictional Statement, 6. In fact, as pointed out by the Mississippi Supreme Court, Bankers Life denied Crenshaw's claim on the basis that Crenshaw's insurance policy contained a provision which stated that for an injury to be covered it must be "caused directly and independently of all other causes and effected solely through an accidental bodily injury." Jurisdictional Statement, App. A, 34a. Furthermore, the Mississippi Supreme Court stated that:

> Despite the consistent holdings of this court that such a policy provision would not have prevented Crenshaw from recovery had the trauma to his foot played any part in the loss of his limb, Bankers Life at all times prior to trial denied coverage for this reason . . . in all correspondence to Crenshaw or his representatives, and after suit was filed in the answer to the interrogatories.

Jurisdictional Statement, App. A, 34a.

The Mississippi Supreme Court noted in its review of this case that "Bankers Life's handling of this claim prior to trial is a striking example of how an insurance company claim should not be handled." Jurisdictional Statement, App. A, 32a. The Court further stated that "Bankers Life denied [Crenshaw's] claim and gave as a reason therefore an exclusion under the policy which its executive personnel knew was invalid under Mississippi law." Jurisdictional Statement, App. A, 33a-34a.

Finally, the Mississippi Supreme Court stated that:

> Conduct such as exemplified by Bankers Life in this case is harmful to the insured public. The company violated standards of conduct enunciated by this Court. It grossly violated its own in-house procedure for investigating a claim. Its executive personnel had to realize that a full and complete investigation posed a very strong likelihood of dissipating any contention that Crenshaw's trauma had absolutely nothing to do with the loss of limb. Yet they simply denied the claim for an invalid reason, especially deceptive in this case, because *on the surface* and to the uninitiated it appeared valid. . . .

Jurisdictional Statement, App. A, 46a-47a (emphasis in original).

After a complete review of the record, the Mississippi Supreme Court affirmed the jury verdict of the Circuit Court of Jackson, Mississippi, which assessed $20,000 compensatory damages and $1,600,000 punitive damages against Bankers Life.

ARGUMENT

I. The Federal Questions Were Not Timely Or Properly Raised In The Court Below

A. The Challenge to *Miss. Code. Ann.* § 11-3-23 Was Not Timely Raised In The Courts Below

Rule 16.1(b) of the Rules of the Supreme Court of the United States states that a motion to dismiss will be received on the ground that "the federal question sought to be reviewed was not timely or properly raised and was not expressly passed on" by the court

below. In the instant case, Bankers Life first challenged the constitutionality of *Miss. Code Ann.* § 11-3-23 (Supp. 1982) in its petition for rehearing before the Mississippi Supreme Court. Bankers Life's challenge to Section 11-3-23, therefore, is not properly before this Court because it was not timely raised before the state courts of Mississippi.

In general, federal questions "first presented to the highest State court on a petition for rehearing come too late for consideration [before the United States Supreme Court]." *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 128 (1945). There are instances, however, when a federal question brought for the first time on rehearing before a state court may be properly appealed to the United States Supreme Court. "Federal claims . . . have been adequately presented [to the Supreme Court] even though not raised in lower state courts when the highest state court renders an unexpected interpretation of state law or reverses its prior interpretation." *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 85 n.9 (1980). *See also Great Northern Railway v. Sunburst Oil & Refinery Co.*, 287 U.S. 358, 366-67 (1923); *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930).

Bankers Life asserts that its challenge to Section 11-3-23 was timely in that "there was no issue concerning the statute" until the Mississippi Supreme Court affirmed the order of the trial court. Jurisdictional Statement, 9. This assertion is specious. Bankers Life knew that the statutory penalty was mandatory and would be assessed if the case were affirmed without modification.[1]

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[1] As the Mississippi Supreme Court noted in 1983:

The practice of the Mississippi Supreme Court, when faced with challenges to Section 11-3-23, is consistent with this general rule. The statutory penalty prescribed by Section 11-3-23 is mandatory and must be imposed if the decision below is affirmed without modification. *Old Security Casualty Insurance Co. v. Clemmer*, 458 So. 2d 732, 733 (Miss. 1984); *Collins v. North Mississippi Savings and Loan Ass'n*, 445 So. 2d 828, 831-32 (Miss. 1984).

In fact, only when the mandatory penalty is *not* imposed has the Mississippi Supreme Court entertained a challenge upon rehearing. *See Wallace v. Jones*, 360 So. 2d 932 (Miss. 1978); *see also Old Security Casualty Insurance Co. v. Clemmer*, 458 So. 2d at 733 (Miss. 1984). Thus, the failure to impose the mandatory penalty is an "unexpected interpretation" of the law, and consideration upon rehearing in such an instance is quite proper.

Under the clear language of the statute, a decision to impose the penalty cannot be termed "unexpected," especially where, as in this case, no challenge to the statute was presented before the decision was rendered.

The practice of the Mississippi Supreme Court when faced with challenges to Section 11-3-23 upon re-

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> Every losing litigant is given an automatic right of appeal. When deciding whether to exercise that right, the penalty statute is there for him to consider. If he is successful on his appeal, of course, he incurs no penalty. *If he loses, however, he must pay the price, a price he well knows and may easily calculate before giving his notice of appeal.*

Walters v. Inexco Oil Co., 440 So. 2d 268, 275 (Miss. 1983) (emphasis supplied).

hearing, therefore, is consistent with the general rule. The Mississippi Court will entertain challenges to the statute or its implementation upon rehearing when its initial decision is somehow unexpected or is a reversal of a previous interpretation. In the instant case, however, the Mississippi Court's decision was neither unexpected nor a reversal of a previous interpretation.

The action of the Mississippi Supreme Court in refusing to consider Bankers Life's challenge may be reconciled with the decision of this Court in *Hathorn v. Lovorn*, 457 U.S. 255 (1982). In *Hathorn*, this Court found that the Mississippi Supreme Court erred in refusing to consider a federal question brought before it upon rehearing, and thereby held that "there are no independent and adequate state grounds barring our review of the federal issue." 457 U.S. at 265.

In so finding, the Court stated that *Hathorn* involved issues that "could have [been] forseen but that arose with urgency only after the court upheld part of a challenged statute." 457 U.S. at 264. Stated differently, in *Hathorn*, this Court found that the Mississippi Supreme Court issued an "unexpected interpretation" by upholding a state statute *which was challenged upon appeal.* Once that decision was rendered, a federal constitutional issue arose with some "urgency," and the federal issue was therefore properly presented upon the petition for rehearing. *See e.g., PruneYard Shopping Center v. Robins*, 447 U.S. at 85 n.9 (1980).

In addition, in *Hathorn* the Court found that the Mississippi Supreme Court could not rely on a state procedural rule which precludes hearing issues first presented on rehearing since that rule was inconsistently applied. 457 U.S. at 263 (*citing Barr v. City of*

Columbia, 378 U.S. 146, 149 (1964)). The Court's holding in *Hathorn*, however, may only apply to those instances in which the Mississippi Supreme Court renders an unexpected interpretation of state law or reverses a prior interpretation. As this Court noted in *Hathorn*, the Mississippi Supreme Court has, in the past, reviewed federal issues first brought on rehearing in instances where it has issued an unexpected interpretation of state law or has reversed a prior interpretation. 457 U.S. at 264; (*citing Quinn v. Branning*, 404 So. 2d 1018 (1981)). The Mississippi Supreme Court's refusal to review the federal issue in *Hathorn*, therefore, was an inconsistent application by that court of the state procedure allowing issues to be brought for the first time upon rehearing when, as a result of the Mississippi Supreme Court's decision, the issue arises, and is anticipated by the parties, for the first time.[2]

In the instant case the Mississippi Supreme Court did not issue an unexpected interpretation of state law when it assessed the fifteen percent penalty. In fact, the assessment was mandatory and in accordance with the plain language of the statute. Bankers Life, therefore, was fully aware of this issue when it

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[2] In *Hathorn*, this Court stated that "The Mississippi Supreme Court now regularly grants petitions for rehearing without mentioning any restrictions on its authority to consider issues raised for the first time in the petitions." 457 U.S. at 263 (footnote omitted). The Court supports this assertion by citing a number of Mississippi cases which granted petitions for rehearing. 457 U.S. at 263 n.14. A study of these cases indicates, however, that in each instance the petition was granted due to *factual* oversights by the Mississippi court. In none of the cases cited did the Mississippi court grant a petition for rehearing in order to consider a *legal* issue raised for the first time in the petition.

submitted its notice of appeal. *See Walters v. Inexco Oil Co.*, 440 So. 2d at 275 (Miss. 1983), *supra* note 1. As such, Bankers Life cannot state that the decision to assess the penalty was unexpected or a reversal of a prior interpretation.

Based on the foregoing, Bankers Life's challenge to Section 11-3-23 was not timely brought before the Mississippi Supreme Court, and this appeal should be dismissed pursuant to Rule 16.1(b) of the Rules of the Supreme Court of the United States.

B. Bankers Life's Due Process Challenge Was Not Timely or Properly Presented in the Courts Below

1. The Challenge Was Not Properly Presented to the Mississippi Supreme Court

In the decision below, the Mississippi Supreme Court made no express reference to Bankers Life's "due process" challenge to the punitive damages award. In general, this Court has held that when a state court has not expressly passed upon a federal question presented to it, "it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street v. New York*, 394 U.S. 576, 582 (1969)(citations omitted). In the absence of such an affirmative showing, the issue will not be reviewed for the first time in the United States Supreme Court. *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969); *Webb v. Webb*, 451 U.S. 493, 495-96 (1981).

Bankers Life has not met its burden of showing that the failure of the Mississippi Supreme Court to address the due process issues was due to a reason other than want of proper presentation. In fact, the

record indicates that want of proper presentation was precisely the reason that the Mississippi Supreme Court did not pass upon the question.

Rule 6 of the Rules of the Mississippi Supreme Court states that an Appellant must assign as error the *specific* issues to be argued on appeal:

> (a) . . . . The assignment of errors shall set out separately and particularly each error asserted and intended to be urged.
>
> (b) *No error not distinctly assigned shall be argued by counsel*, except upon request of the Court, but the Court may, at its option, notice a plain error not assigned or distinctly specified.

Miss. Sup. Ct. R. 6 (emphasis supplied). The Mississippi Supreme Court strictly applies Rule 6, and does not consider appeals not specifically assigned in the assignment of errors. *Harkins v. Paschall*, 348 So. 2d 1019, 1024 (Miss. 1977); *Dorroh v. Cotten*, 259 So. 2d 121, 123 (Miss. 1972). *See also Overstreet v. Allstate Insurance Co.*, 474 So. 2d 572, 577 (Miss. 1985). In addition, the plain language of the rule indicates that an appellant cannot cure a defect in the assignment of errors by presenting a more specific argument in the brief.

In the instant case, Bankers Life's Assignments of Error to the Mississippi Supreme Court, attached hereto as Appendix A, do not set out the due process challenge with the required specificity. The assignment simply states that "[t]he award of punitive damages violates Appellant's due process rights." App. A, 2a. The assignment does not specify whether it refers to due process rights arising under the Mis-

sissippi or the United States Constitution. In addition, the assignment does not specify that it was the *excessiveness* of the punitive damage award that allegedly violated some unidentified due process right. Upon reading the assignment of error, it appears that Bankers Life was challenging *any* award of punitive damages, regardless of the amount of the award. It is entirely reasonable to assume, therefore, that in light of the lack of specificity of the assignment of error the Mississippi Supreme Court merely applied Rule 6 and refused to entertain the issue.

The Mississippi Supreme Court's refusal to entertain the issue is consistent with decisions of this Court. In *Webb v. Webb*, 451 U.S. 493, 495-96 (1981), the appellant appealed a decision of the Georgia Supreme Court. Before the Georgia court, the appellant had alleged violations of the principle of full faith and credit. This Court, however, refused to allow an appeal because the full faith and credit claim had never been passed upon by the state Supreme Court. 451 U.S. at 495.

In *Webb*, the appellant argued that, despite its failure to specifically refer to the full faith and credit clause of the United States Constitution, it had used the phrase "full faith and credit." The appellant argued that, since the Georgia Constitution has no full faith and credit clause, the appeal below obviously referred to the United States Constitution. 451 U.S. at 496. This Court, however, disagreed, stating that the Georgia Supreme Court, even in the absence of a state constitutional provision, could have interpreted the appellant's challenge as one directed at *state* law. *Id.*

In the instant case, Bankers Life's reference to the federal Constitution is even less specific than that in *Webb*. The Mississippi Constitution does include a due process clause. Miss. Const. art. 3, § 14. Moreover, Bankers Life's Brief before the Mississippi Supreme Court cites state law to support its contention that the award of punitive damages has a "chilling effect" on the "fundamental right of access to the courts." App. B, 4a-5a. Specifically, the brief cites sections 24 and 25 of article 3 of the Mississippi Constitution and a Mississippi Supreme Court case, *Standard Life Insurance Co. of Indiana v. Veal*, 354 So. 2d 239 (Miss. 1978). *Id.*

In light of the lack of specificity in Bankers Life's assignments of error it is entirely reasonable to assume that the Mississippi Supreme Court might have construed this as a challenge under the *state* constitution, and that because of the confusion, the court simply applied Rule 6 and refused to consider the issue because of the lack of specificity.

The facts of this case indicate that Bankers Life's due process claims were not adequately presented in the court below, and that this want of proper presentation underlay the refusal of the Mississippi Supreme Court to address these issues. Since the due process issues were not properly presented below the appeal should be dismissed.

2. *The Due Process Challenge Was Not Properly Brought Before the Trial Court*

Bankers Life's due process challenge was not properly presented in the courts below since it was not properly presented to the Circuit Court of Jackson County, Mississippi.

(a) The Appellant Did Not Include Its Constitutional Challenge To The Claim For Punitive Damages In Its Affirmative Defense

Miss. Code Ann. § 11-7-59(4) (1972), which was in effect as of the time of the trial in this case, stated that:

> If the defendant desire to prove, by way of defense in an action, any affirmative matter in avoidance, which by law may have been proved heretofore under special plea he shall set forth in his answer to the action such affirmative matter and incorporate such defense therein, otherwise such matter shall not be allowed to be proved at trial.

Bankers Life's Answer in the trial court, attached hereto as Appendix C, contained mere general denials of the allegations of the Declaration. There were no affirmative defenses raised in the Answer, and the Answer contained no references to any constitutional issues.

Under the terms of Section 11-7-59, therefore, the constitutional issues were never properly raised before the trial court, and could not have been argued before that court. The Supreme Court of Mississippi has consistently refused to consider on appeal defenses which were not alleged or argued at trial. *Cain v. Mid-South Pump Co.*, 458 So. 2d 1048, 1051 (Miss. 1984); *Dobbs-Maynard Co., Inc. v. Jumper*, 388 So. 2d 879, 883 (Miss. 1980); *Memphis Bank & Trust Co. v. Pate*, 362 So. 2d 1245, 1250 (Miss. 1978).

In addition, state and federal constitutional questions which are not raised in the lower court will not be reviewed by the Mississippi Supreme Court. *Stew-*

art v. City of Pascagoula, 206 So. 2d 325, 328 (Miss. 1968); *State v. Cabana Terrace, Inc.*, 247 Miss. 26, 153 So. 2d 257 (1963); *Comfort v. Landrum*, 52 So. 2d 658 (Miss. 1951).

The Mississippi Supreme Court, therefore, could not review any constitutional issues raised since such issues were not included in the Appellant's affirmative defense before the trial court.

(b) The Constitutional Challenges Were Not Included In The Motion For New Trial

In Mississippi, an issue is not timely or properly presented to the Mississippi Supreme Court unless it has been first included in a motion for new trial and passed on by the trial court. An assignment of error to the State Supreme Court that was not included in the motion for new trial is deemed waived and will not be considered on appeal. *Mississippi State Highway Commission v. Rives*, 271 So. 2d 725, 729 (Miss. 1972); *Mercier v. Davis*, 234 So. 2d 902, 904 (Miss. 1970); *Briscoe v. Briscoe*, 255 So. 2d 313, 314 (Miss. 1971).

In the instant case the Motion for New Trial, attached hereto as Appendix D, does not challenge the jury's award of punitive damages based on a denial of rights under the Due Process Clause of the United States Constitution. Rather, the Motion merely states that "[t]he verdict of the jury was so excessive as to evidence bias, passion and prejudice against the Defendant." App. D, 11a. Such imprecise language does not constitute a due process claim under the Constitution of the United States. *See Webb v. Webb*, 451 U.S. 493, 496 (1981). Thus, the trial court was not presented with the opportunity to reach the con-

stitutional issue of whether the award of punitive damages violated the Eighth Amendment of the United States Constitution, the Contract Clause of the United States Constitution, or the Due Process Clause of the United States Constitution.

Under the law of Mississippi, therefore, the Mississippi Supreme Court could not have reviewed Bankers Life's due process claims since they were neither timely nor properly presented before the trial court.[3]

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[3] In this context, Bankers Life's statements to the effect that it "first challenged the excessiveness of the punitive damage award in its post-trial motions," Jurisdictional Statement, 10, and that the challenge "was renewed on direct appeal to the Supreme Court of Mississippi," Jurisdictional Statement, 11, are, at best, disingenuous. The basis of Bankers Life's challenge in each court has been different. Before the trial court Bankers Life claimed "bias" on the part of the jury. App. D, 11a. In its assignments of error to the Mississippi Supreme Court Bankers Life claimed that the award of punitive damages violated its "due process" rights. App. A, 2a. In its brief before the Mississippi Supreme Court and in the Motion for Rehearing before the Mississippi Supreme Court, the basis for the challenge had become the "chilling effect" the punitive damage award had upon Bankers Life's "fundamental right" of access to the courts. Jurisdictional Statement, App. A, 135a. Now, before this Court, Bankers Life challenges the award on the basis of the Eighth Amendment and the Contract Clause of the United States Constitution.

In this case, the courts below have had no opportunity to rule on the issues presented by the Appellant because Bankers Life has made different arguments to each court. An issue cannot be properly presented in the courts below if the issues change at each level of appeal. It is obvious that, in the instant case, the courts below have never had the opportunity to rule on the issues that Bankers Life has raised at the next level of review. In all probability, this is why the Mississippi Supreme Court

Under the terms of Rule 16.1(b) of the Rules of the Supreme Court, therefore, this appeal should be dismissed.

II. The Appeal Does Not Present A Substantial Federal Question

Neither of the questions contained in the Appellant's Jurisdictional Statement presents a substantial federal question worthy of review by this Court. Accordingly, the appeal should be dismissed under Rule 16.1(b) of the Rules of the Supreme Court.

A. *Miss. Code Ann.* § 11-3-23 Is Constitutional

1. *Purpose of Miss. Code Ann. § 11-3-23*

Miss Code Ann. § 11-3-23 (Supp. 1982) provides for a fifteen percent penalty to be assessed upon any appellant who unsuccessfully appeals a money judgment. As the Supreme Court of Mississippi explained in *Walters v. Inexco Oil Company*, 440 So. 2d 268 (Miss. 1983), the statute has two purposes. "The penalty statute expresses the state's interests in discouraging frivolous appeals. It likewise expresses a bona fide interest in providing a measure of compensation for the successful appellee." 440 So. 2d at 274.

2. *Miss. Code Ann. § 11-3-23 Does Not Violate the Equal Protection Clause*

Section 11-3-23 accomplishes its purpose through the assessment of the fifteen percent penalty. The statute does not violate the Equal Protection Clause of the United States Constitution since it has general

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refused to entertain the Appellant's due process claims. The want of proper presentation below warrants a similar refusal in this Court.

application to all litigants. In addition, the penalty bears a rational relationship to the purpose of the statute.

In *Lindsey v. Normet*, 405 U.S. 56, 77 (1972), this Court stated that "[w]hen an appeal is afforded, . . ., it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause." Section 11-3-23 does not capriciously or arbitrarily deny Bankers Life access to appeal in the State of Mississippi.

First, the statute has general application to all litigants appealing from a money judgment. The penalty applies equally to Bankers Life as it does to a plaintiff dissatisfied with a money judgment who appeals and whose judgment is affirmed. *Antley v. Mississippi State Highway Comm'n*, 318 So. 2d 847, 851 (Miss. 1975); *Pearce v. Ford Motor Co.*, 235 So. 2d 281, 283 (Miss. 1970); *Eagle Lumber and Supply Co. v. Robertson*, 161 Miss. 17, 135 So. 499, 500 (1931).

Second, the penalty statute does not present a prior bar to appeal. It is only assessed after the fact of the appeal. Therefore, an unsuccessful litigant has no monetary barrier which must be cleared *before* filing a notice of appeal.

Third, the assessment of only a fifteen percent penalty is rationally related to the purpose of compensating appellees forced to bear the expense of an unwarranted appeal while discouraging appellants such as Bankers Life from prosecuting unwarranted appeals.

For example, during the pendancy of this appeal, prevailing interest rates provided an economic incentive for appellants such as Bankers Life to delay the imposition of a judgment by any means possible, in-

cluding appeal. Bankers Life was able to retain the use of money owed as a result of the judgment below for a period of four years between 1981 and 1985. Between 1981 and 1984 the interest rate, as evidenced by the effective rate paid for federal funds, ranged from 16.38 percent in 1981 to 10.23 percent in 1984. U.S. Dep't of Com., Bur. of the Census, Statistical Abstract of the United States 1986 (106th ed.) Table No. 853 ("Money Market Interest Rates: 1970 to 1985"), at 505. The statutory rate of interest applied to Crenshaw's award in this appeal, however, was only eight percent. Jurisdictional Statement, 102a. Without the fifteen percent penalty, appellants such as Bankers Life would have an economic incentive to delay the imposition of a judgment as long as possible, including by appeal, merely to take advantage of the difference in interest rates. The fifteen percent penalty of Section 11-3-23, however, removes this economic incentive to appeal.

Fourth, the statute is narrowly drawn so that the penalty does not discourage meritorious appeals. The penalty applies only in those cases when the judgment of the trial court is affirmed *without modification*. If the Mississippi Supreme Court finds that *any* portion of the appeal is meritorious, and modifies the judgment of the trial court in *any* way, the penalty statute does not apply. *Old Security Casualty Insurance Co. v. Clemmer*, 458 So. 2d 732, 733 (Miss. 1984).

3. *Section 11-3-23 Is Consistent With The Decisions Of This Court*

Section 11-3-23 is consistent with the decisions of this Court. In *Lindsey v. Normet*, 405 U.S. 56 (1972), this Court held that a provision of the Oregon Forcible Entry and Wrongful Detainer Statute ("FED")

which required the posting of a double bond before appeal, violated the Equal Protection Clause. 405 U.S. at 74-79. The statute at bar in *Lindsey*, however, is easily distinguishable from Section 11-3-23.

First, the *Lindsey* statute applied only to *tenants* seeking to reverse an action taken under one particular statute. 405 U.S. at 79. Such is not the case with Section 11-3-23. Section 11-3-23 has general application to *all* litigants who appeal from a money judgment. Therefore, it does not create a class of persons unable to exercise an opportunity to appeal.

Second, it is significant to note that in order to appeal a civil case in Oregon, a litigant was required to file a bond equal to the amount of the award plus the anticipated costs of the appeal. 405 U.S. at 74. In comparing the double bond requirement of the FED to the general requirement, this Court stated that "[s]imilar conditions on the tenant's right to appeal, such as those imposed by [the general requirement] would . . . raise no serious constitutional questions." 405 U.S. at 76. In *Lindsey v. Normet*, therefore, this Court implicitly stated that a narrowly drawn bonding requirement or penalty statute does not violate the Equal Protection Clause.

Section 11-3-23 is even less restrictive than the Oregon general bonding requirement implicitly approved in *Lindsey*. Section 11-3-23 does not require the posting of a bond *before* appeal. Therefore, it does not bar "nonfrivolous appeals by those who are unable to post the bond," 405 U.S. at 78, since there is no prior monetary bar or restriction on the ability to appeal.

Third, in *Lindsey*, this Court found that the double bond requirement did not effectuate the stated pur-

poses of the statute because the amount of the bond was unrelated to any damages or costs the appellee might suffer. 405 U.S. at 78. This is not the case with Section 11-3-23. In *Lindsey*, an FED appellant had to post a bond equal to two hundred percent of the judgment below, which would be forfeited to the landlord if the judgment were affirmed. On its face, such an amount could bear no rational relationship to the damages suffered or the costs incurred by a landlord as a consequence of the appeal. The Mississippi penalty, however, does bear a rational relationship between the damages suffered and the costs incurred. As noted above, during the time of this appeal, Bankers Life could have *earned* up to sixteen percent interest merely by investing the amount of the award at prevailing interest rates.

Moreover, in *Lindsey*, this Court stated that "[w]e do not question here reasonable procedural provisions . . . to discourage patently insubstantial appeals if those rules are reasonably tailored to achieve these ends and if they are uniformly and nondiscriminatorily applied." 405 U.S. at 78.

The foregoing discussion indicates that Section 11-3-23 is a narrowly drawn, generally applicable statute designed to implement two legitimate purposes of the State of Mississippi. As such, it is clearly constitutional and Bankers Life's equal protection challenge presents no substantial federal question. Therefore, the appeal should be dismissed pursuant to Rule 16.1(b) of the Rules of the Supreme Court.

B. The Punitive Damage Award Does Not Violate the Constitution

Bankers Life also alleges that the award of $1,600,000 as punitive damages violates the Excessive

Fines Clause of the Eighth Amendment and the Contract Clause of the United States Constitution. These arguments are specious and present no substantial federal question.

1. *The Excessive Fines Clause Applies Only to Criminal Proceedings*

Bankers Life misconstrues the reach of the Eighth Amendment. The Excessive Fines Clause of the Eighth Amendment applies only to criminal proceedings. *Ingraham v. Wright*, 430 U.S. 651, 664-66 (1977).

Bankers Life's argument that the Excessive Fines Clause should apply by analogy to civil punitive damage awards, Jurisdictional Statement, 16-17, flies in the face of decisions of this Court dating back to 1833, which limit the application of the Eighth Amendment to criminal proceedings. *See, e.g., Ex parte Watkins*, 32 U.S. (7 Pet.) 568, 574 (1833).[4]

Since the Excessive Fines Clause of the Eighth Amendment applies only to criminal proceedings, Bankers Life's challenge to the punitive damage award on this basis presents no substantial federal question and should be dismissed.

2. *The Punitive Damages Awarded Are Not Excessive*

Bankers Life also argues that the punitive damage award was excessive in that it bears no substantial

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[4] In its Jurisdictional Statement at 16-17, Bankers Life cites *Solem v. Helm*, 463 U.S. 277 (1983), to support its contention that the punitive damages awarded in the instant case are "without doubt excessive under the Eighth Amendment as interpreted and applied" in *Solem*. This argument blatantly ignores both the limitations of the Eighth Amendment and the decisions of this Court. *Solem* was a criminal, and not a civil case. 463 U.S. at 279-81. Therefore, it cannot support the proposition that a civil punitive damage award is excessive.

relationship to the damages suffered by Mr. Crenshaw. Jurisdictional Statement, 16. In support of this assertion, Bankers Life claims that the punishment far exceeded any possible criminal liability of Bankers Life, as measured by *Miss. Code Ann.* § 83-17-1 (1972). This argument is specious and disingenuous.

First, this Court has long recognized that punitive damages are assessed in civil cases according to the severity of the defendant's misconduct, rather than the injury suffered by the plaintiff. As this Court stated in *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851):

> It is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive or vindictive damages upon a defendant, having in view the enormity of his offense rather than the measure of compensation to the plaintiff.

See also Massachusetts Bonding & Insurance Co. v. United States, 353 U.S. 128, 133 (1956) ("By definition, punitive damages are based upon the degree of the defendant's culpability").[5]

Second, Bankers Life's argument that the punitive damage award is excessive in that it is "3200 times greater than the relevant statutory fine for the closest analog criminal offense" is irrelevant. Jurisdictional

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[5] Even under the Eighth Amendment, this Court has long recognized that the focus of review is the relationship between the defendant's misconduct and the severity of the penalty imposed, *not* the relationship between the penalty and the damage suffered by the victim. *Solem v. Helm*, 463 U.S. at 284.

Statement, 16. The statute cited by Bankers Life, *Miss. Code Ann.* § 83-17-1 (1972), has nothing to do with this case. As Bankers Life admits, Section 83-17-1 governs fraud "in the procurement of payment or obligation for payment of insurance premiums." Jurisdictional Statement, 16. This statement has no application to the case at bar, in which Bankers Life was found to have committed the tort of bad faith refusal to pay an insurance claim. Jurisdictional Statement, 7.

In addition, Section 83-17-1 provides that any person who violates the terms of the statute "shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, *or be imprisoned for not more than one year.*" *Miss. Code Ann.* § 83-17-1 (emhasis supplied). Thus, even if this statute were applicable to the case at bar, and even if the Eighth Amendment were applicable to civil actions, the punitive damage in this case would not be excessive.

Under the statute cited by Bankers Life, if Bankers Life were a natural person and convicted under the statute, it could have been imprisoned for one year, thereby suffering the loss of one's year's income. Bankers Life's net gain from operations after dividends paid to policy holders and the payment of federal income taxes for the year 1980 was $29,350,186. *See* Statement of Bankers Life and Casualty for the year ended December 31, 1981, submitted to the Circuit Court of Jackson County, Mississippi as Plaintiff's Exhibit 9. Bankers Life's maximum loss of income, therefore, would have been $29,350,186, almost thirty times *greater* than the punitive damages awarded in this case. In this manner, even if the punitive dam-

ages in this case are compared to the liability under the criminal statute cited by Bankers Life, the punitive damage award levied against it is more than reasonable.

3. *The Award of Punitive Damages Does Not Violate The Due Process Clause*

Bankers Life further claims that the amount of the punitive damage award was excessive, and as such violated the Due Process Clause of the Fourteenth Amendment of the Constitution. Jurisdictional Statement, 17-21. This argument, however, has no basis in law.

The award of punitive damages has long been recognized as proper by this Court. In *Milwaukee & St. Paul Railway Co. v. Arms,* 91 U.S. 489, 493 (1876), this Court stated that since the doctrine of punitive damages "is too well settled now to be shaken, . . . exemplary damages may in certain cases be recovered."

This doctrine was reiterated as recently as 1984. In *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), a diversity case involving Oklahoma law, this Court upheld an award of $10,000,000 in punitive damages. In rejecting a claim that the federal Atomic Energy Act preempted an award of punitive damages, the Court stated that "[p]unitive damages have long been a part of traditional state tort law." 464 U.S. at 255.

In addition, even assuming *arguendo* that the Due Process Clause permits an inquiry regarding the amount of punitive damages awarded,[6] the damages

[6] The Appellee also submits that accepting this case for review raises the spectre of the Supreme Court having to review any imposition of punitive damages by any state court, since all such awards would then be open to due process attack.

awarded in this case were not so excessive as to violate due process.

As noted above, the measure of punitive damages is not the damage suffered by the plaintiff, but rather the severity of the defendant's misconduct. *Day v. Woodworth,* 54 U.S. at 371; *Massachusetts Bonding and Insurance Co. v. United States,* 353 U.S. at 133. In the instant case, the Supreme Court of Mississippi clearly stated that the bad faith refusal to pay an insurance claim is reprehensible conduct which gives rise to exemplary damages. In *Standard Life Insurance Co. of Indiana v. Veal,* 354 So. 2d 239 (Miss. 1978), the Supreme Court of Mississippi stated that:

> If an insurance company could not be subjected to punitive damages it could intentionally and unreasonably refuse payment of a legitimate claim with veritable impunity. To permit an insurer to deny a legitimate claim, and thus force a claimant to litigate with no fear that claimant's maximum recovery could exceed the policy limits plus interest, would enable the insurer to pressure an insured to a point of desperation enabling the insurer to force an inadequate settlement or avoid payment entirely.

Id. at 248.

At trial, the trier of fact determined that there had been such a bad faith refusal, and returned its verdict and award. The Supreme Court of Mississippi found no error in the jury's verdict. Jurisdictional Statement, App. A., 49a-52a. Bankers Life's culpability and liability, therefore, were determined within the bounds of the due process of law. As such, the award did not violate the Due Process Clause of the Fourteenth

Amendment. Bankers Life's appeal on this basis should be dismissed.

4. *The Award of Punitive Damages Does Not Violate The Contract Clause*

In its Jurisdictional Statement, Bankers Life claims that the award of punitive damages violates the Contract Clause, Article I, Section 10, clause 1, of the United States Constitution, inasmuch as the damages were based on "changes in the law" effected bythe Mississippi Supreme Court. Jurisdictional Statement, 18-19 n.7. Bankers Life argues that the changes "would raise a substantial issue under the Contract Clause if the Mississippi legislature had attempted to impose new rules retrospectively on insurance contracts to the detriment of insurers." *Id.* This argument is irrelevant and has no application to the case at bar. The Contract Clause applies *only* to acts of the state legislature.

In *Tidal Oil Co. v. Flanagan,* 263 U.S. 444 (1924), this Court rejected a claim that the decision of the Supreme Court of Oklahoma violated the Contract Clause by changing a facet of the state property law upon which the action at bar depended. The Court stated that:

> [i]t has been settled by a long line of decisions, that the provision of § 10, article 1, of the Federal Constitution, protecting the obligation of contracts against state action, *is directed only against impairment by legislation, and not by judgments of courts.*

Id. at 451 (citations omitted) (emphasis supplied).

The Contract Clause of the Constitution has never been applied, before or after the decision in *Tidal*

Oil, to actions of the state courts.[7] Thus, Bankers Life's argument presents no substantial federal question and provides no basis for jurisdiction since the constitutional provision upon which it is based, the Contract Clause, is inapplicable to the actions of the Mississippi Supreme Court. This appeal, therefore, should be dismissed.

CONCLUSION

In *Aetna Life Insurance Co. v. Lavoie*, 54 U.S.L.W. 4381, 4386 (U.S. April 22, 1986) this Court stated that questions similar to those presented for consideration in this case "raise important issues which, in an appropriate setting, must be resolved." This case, however, is not an appropriate setting for the resolution of these questions inasmuch as Bankers Life neither properly nor timely presented the questions for consideration in the state courts below.

In addition, none of the questions presented in Bankers Life's Jurisdictional Statement presents a substantial federal question worthy of review by this Court. As such, the Appellee respectfully moves that this appeal be dismissed in accordance with Rule 16.1(b) of the Rules of the Supreme Court of the United States.

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[7] *See, e.g., Barrows v. Jackson*, 346 U.S. 249, 260 (1953); *Rooker v. Fidelity Trust Co.*, 261 U.S. 114, 118 (1923); *Central Land Co. v. Laidley*, 159 U.S. 103, 109 (1895); *New Orleans Waterworks Co. v. Louisiana Sugar Refinery Co.*, 125 U.S. 18, 30 (1888); *Frazier v. Lowndes County Board of Education*, 710 F.2d 1097, 1099 (5th Cir. 1983); *Marinello v. Shell Oil Co.*, 511 F.2d 853, 859 (3d Cir. 1975); *Ruth v. Bituminous Casualty Corp.*, 427 F.2d 290, 193 (6th Cir. 1970).

May 28, 1986

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APPENDIX

APPENDIX A

IN THE SUPREME COURT OF MISSISSIPPI

NO. 54,123

BANKERS LIFE AND CASUALTY CO.
v.
LLOYD M. CRENSHAW

ASSIGNMENTS OF ERROR

A.

The trial court erred in submitting the issue of punitive damages to the jury as there is no proof of any action by Bankers Life which could support an award of punitive damages under the applicable law.

B.

The punitive damages award was not only erroneous, it was grossly excessive and the trial court erred in failing to grant a new trial or a remittitur on this basis.

C.

The trial court erred in allowing Appellee to question Appellant's medical expert regarding civil malpractice actions.

D.

The trial court erred in denying Appellant's motion for mistrial after learning a juror had failed to properly respond to voir dire questions.

E.

The trial court erred in permitting improper argument of counsel and in overruling Appellant's motion for mistrial.

F.

The award of punitive damages violates Appellant's due process rights.

Respectfully submitted,

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APPENDIX B

IN THE SUPREME COURT OF MISSISSIPPI

NO. 54,123

BANKERS LIFE AND CASUALTY CO.
v.
LLOYD M. CRENSHAW

BRIEF OF THE APPELLANT

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* * * * *

F.

THE AWARD OF PUNITIVE DAMAGES VIOLATES APPELLANT'S DUE PROCESS RIGHTS

The right of access to the courts is a fundamental right implicit in the concept of ordered liberty and guaranteed by the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution; *Ex Parte Hull*, 312 U.S. 546, 61 S. Ct. 640, 85 L. Ed. 1034 (1941); *Johnson v. Avery*, 393 U.S. 483, 89 S. Ct. 747, 21 L. Ed.2d 718 (1969); *NAACP v. Button*, 371 U.S. 415, 83 S. Ct. 328, 9 L. Ed.2d 405 (1963); and Sections 24 and 25 of Article 3 of the Mississippi Constitution of 1890. The threat of unrestricted punitive damages awards, such as

$1,600,000, existing whenever an insurer litigates a contested claim, has a substantial "chilling effect" on the exercise of this fundamental right. This threat of unlimited punishment constitutes an oppressive influence on an insurer's decision whether to contest any claim. The dissent in *Standard Life v. Veal*, expressed its displeasure with this fundamental unfairness as follows:

> The Constitutional right of a litigant to defend a suit brought against him will be severely chilled, to say the least, if he is required to expose himself to the prospect that in the event he and his counsel should prove to be mistaken in their position and he loses, he will be assessed with punitive damages. This has never been the law in Mississippi, and should never be.

354 So. 2d at 252, 253.

Allowing a punitive damage award against Bankers Life because it chose to litigate the issue of coverage violates its due process rights and the rights of others similarly situated.

G.

CONCLUSION

Bankers Life submits to this Court and urges this Court to find that this was not a proper case for imposing a punitive damage award. This court has accomplished its purpose in *Veal* and *Wetherbee*, of warning insurers to deal fairly and justly with their insureds. This Court should continue to follow the course it has chartered in prior "bad faith" cases and allow punitive damages only where the insurer has been guilty of "intentional wrong, insult, abuse or gross negligence." To affirm this case, where there existed a genuine disputed issue of medical fact, would serve Mr. Crenshaw quite well. It would not serve the best interest of the citizens of the State of Mississippi nor

would it serve the ends of justice and fairness which this Court has always sought.

> 'We are slow to impose upon an insurer liabilities beyond those called for in the insurance contract. To create exposure to such risks except for the most extreme circumstances would, we are certain, be detrimental to the consuming public whose insurance premiums would surely be increased to cover them.'

Findley v. Time Ins. Co., 573 S.W.2d 908, 910 (Ark. 1979) quoting *Newton v. Standard Fire Ins. Co.*, 291 N.C. 105, 229 S.E.2d 297 (1976).

Respectfully submitted,

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APPENDIX C

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSISSIPPI

CAUSE NO. 11,292

LLOYD M. CRENASHAW

v.

BANKERS LIFE AND CASUALTY CO.

ANSWER

COMES NOW the Defendant, Bankers Life and Casualty Company, by and through its duly authorized attorneys, and files this its Answer to the allegations of the Declaration in the above styled Cause, and in support thereof would respectfully show unto the Court as follows, to-wit:

1. The Defendant admits the allegations of Paragraph I of the Declaration.

2. The Defendant admits its corporate status alleged in Paragraph II of the Declaration. The Defendant does not know how the further allegations of Paragraph II relate to the claim in question, and therefore denies same.

3. The Defendant admits the allegations contained in Paragraph III of the Declaration.

4. The Defendant is without information upon which to base an admission or denial as to the alleged circumstances

concerning the cause of the Plaintiff's injury and his subsequent medical treatment, and therefore must hereby deny same. The Defendant admits that the Plaintiff made a claim under the insurance policy in question, and that said claim has been refused. The Defendant admits that the Plaintiff has given proper notice, but denies that he is entitled to the benefits as claimed, all as alleged in Paragraph IV of the Declaration.

5. The Defendant admits the fact of the Plaintiff's demands and that the claim has been denied, but denies that said denial was based upon erroneous information, and further denies the Plaintiff's interpretation of Exhibit A stating that same speaks for itself, all as alleged in Paragraph V of the Declaration.

6. The Defendant denies the allegations of Paragraph VI of the Declaration, except to admit that Exhibit B speaks for itself.

7. The Defendant admits the allegations concerning the provisions of the insurance contract as alleged in Paragraph VII of the Declaration, but denies that the refusal thereof was based upon a legitimate claim which forced the Plaintiff to litigate, all as alleged in Paragraph VII of the Declaration.

8. The Defendant denies the allegations of Paragraph VIII of the Declaration and each sub-paragraph thereof.

9. The Defendant denies the allegations of Paragraph IX of the Declaration.

10. The Defendant denies the allegations of Paragraph X of the Declaration.

WHEREFORE, PREMISES CONSIDERED, your Defendant denies that it is indebted unto the Plaintiff in the sum of $20,000.00 as provided for in the insurance contract, or for the sum of $400,000.00 punitive damages, or any sum whatsoever, and hereby requests to be dismissed from this cause, with costs to the Plaintiff.

Respectfully submitted,

BANKERS LIFE AND CASUALTY COMPANY

BY: MEGEHEE, BROWN, WILLIAMS & MESTAYER

BY: /s/John M. Kinard
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APPENDIX D

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSISSIPPI

CAUSE NO. 11,292

LLOYD M. CRENSHAW
v.

BANKERS LIFE AND CASUALTY CO.

MOTION FOR NEW TRIAL OR REMITTITUR IN THE ALTERNATIVE

COMES NOW the Defendant, BANKERS LIFE AND CASUALTY COMPANY, by and through its duly authorized attorneys, and files this its Motion for New Trial or Remittitur in the Alternative, and in support thereof, would respectfully show unto the Court as follows, to-wit:

I.

That a jury award was rendered against your Defendant on December 3, 1981, in the sum of $20,000.00 in actual damages and $1,600,000.00 in punitive damages in this cause. That your Defendant being aggrieved thereby, and by certain rulings of the Court therein, files this Motion in order for the trial court to review its findings and the jury's award pursuant to Section 11-1-55 of the Mississippi Code of 1972, Annotated.

II.

The verdict of the jury was so excessive as to evidence bias, passion and prejudice against the Defendant, BANKERS LIFE AND CASUALTY COMPANY; therefore, your Defendant is entitled to a new trial thereby.

III.

That the Court erred in allowing the issue of punitive damages to go before the jury because there was an arguable and reasonable basis for the denial of the payment of Plaintiff's claim for insurance benefits and therefore, by so allowing this issue before the jury, the lower court has committed error for which new trial should be granted.

IV.

That the Court committed error in refusing certain of the Defendant's jury instructions and granting certain of the Plaintiff's jury instructions which prejudiced the Defendant and formed the basis of error in this case.

V.

That the trial court failed to grant the Defendant's motion for mistrial dealing with the issue of an improperly impounded juror and improper statements by Plaintiff's counsel during closing argument.

VI.

That the jury was allowed to consider testimony of two witnesses by deposition whose testimony was not properly offered into evidence; therefore, same should have not been considered by the Court and Jury and their having done so constituted error.

VII.

That the Court erred in allowing the introduction of witness' testimony by deposition over objection when the

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original of said deposition had not, at the time same was read into open court, been filed with the Clerk of the Court as required by law. That further, there is no showing in the record that said deposition was ever made a part of the file with the Court Clerk or the Court itself during the pendency of the trial nor was the same ever offered into evidence after having been so read into the record.

WHEREFORE, PREMISES CONSIDERED, your Defendant prays that the Court will duly consider and grant this its Motion for new trial or in the alternative grant it a substantial remittitur from the jury's award in this action, for these and other causes to be shown on the hearing hereof.

Respectfully submitted,

BANKERS LIFE AND CASUALTY COMPANY

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